

The sole issue to be addressed is whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent, including whether claimant's alleged accident was the prevailing factor in causing claimant's injury, medical condition and resulting disability or impairment.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, this Board Member makes the following findings of fact and conclusions of law:

Daniel Hart, who was age 46 when he testified at the two preliminary hearings in this claim, was employed by respondent as a crew chief at a McDonald's restaurant. He had worked for respondent for approximately 11 years. Mr. Hart testified:

Q. Okay. Before February 29, 2012, were you having any problems with blood clots or deep veinous [sic] thrombosis or taking Coumadin, anything like that?

A. The only problem I had was sore feet from working seven hour shifts with no breaks.

Q. And what happened to you on February 29, 2012?

A. 'Um, while I was putting away the quarter for the evening I was lifting up a case of pop serve, which is probably 30, 40 pounds, and, 'um, I noticed after I had gotten it put on the rack that my [left] leg was hurting, so I thought, well, maybe I strained a muscle. So I made the comment to my swing manager that was working and -- that, you know, my leg hurt, and he goes, okay, didn't do anything about that.¹

Claimant continued to experience left leg pain and swelling after February 29, 2012. On March 7, 2012, claimant sought treatment at the emergency room at St. Francis Hospital and Medical Center in Topeka, Kansas. Claimant provided a history of his accident. Dr. Laurel A. Vogt examined claimant and ordered a venous Doppler ultrasound, which was conducted on March 7, 2012. The ultrasound revealed a large deep venous thrombosis in the left femoral vein, extending into the left popliteal vein. Claimant was admitted to the hospital for overnight observation. Dr. Vogt diagnosed deep venous thrombosis of the left leg and prescribed Coumadin and Lovenox. On March 23, 2012, claimant returned to the emergency room for treatment and was again admitted for observation. He last worked for respondent on March 23, 2012. The next day claimant was released from the hospital.

Claimant testified that if he stands for longer than 30 minutes to an hour at a time, the swelling in his left leg increases enough that he needs to rest and elevate his leg.

Claimant smokes approximately 1¼ packs of cigarettes per a day, weighs 328 pounds, and has elevated blood pressure.

¹ P.H. Trans. (May 21, 2012) at 8.

Regarding causation, Dr. Vogt stated: "The cause of this problem is unknown. It may be related to his obesity and smoking. His work activities likely aggravated the problem."²

On April 13, 2012, Dr. Daniel Zimmerman examined claimant at his attorney's request. He reviewed claimant's medical records and conducted a physical examination. Dr. Zimmerman expressed his opinion regarding causation: "The deep vein thrombosis is casually related to that [sic] work duties performed on February 29, 2012 at McDonald's restaurant."³ Dr. Zimmerman also opined that claimant's performance of job duties on the date of his accident was the prevailing factor in causing the thrombosis.

K.S.A. 2011 Supp. 44-501b(b) and (c) provide:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-508(h) provides:

'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2011 Supp. 44-508(f) provides in relevant part:

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

² P.H. Trans.(May 21, 2012), Cl. Ex. 1 at 4.

³ *Id.*, Cl. Ex. 2 at 4.

- (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
- (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2011 Supp. 44-508(g) provides:

'Prevailing' as it relates to the term 'factor' means the primary factor, in relation to any other factor. In determining what constitutes the 'prevailing factor' in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

The undersigned Board member finds that the ALJ's July 26, 2012 Preliminary Hearing Order should be affirmed. The Board has jurisdiction to review the issue raised by claimant pursuant to K.S.A. 2011 Supp. 44-534a(a)(2).

The preponderance of the credible evidence does not prove that there was a causal connection between the lifting claimant performed on February 29, 2012, and his development of deep vein thrombosis in his left leg. Nor does the evidence support the conclusion that claimant's accident was the prevailing factor causing the injury, medical condition, and resulting disability or impairment alleged by claimant.

The medical opinions regarding causation are in conflict. Unfortunately, neither Drs. Vogt nor Zimmerman provide any rationale supporting their opinions. Based on the record before the undersigned Board member, it is equally likely that claimant's vascular issues in his left leg were caused by his obesity and/or his consumption of tobacco as opposed to his lifting at work for respondent. Although Dr. Vogt mentions that claimant's work likely aggravated claimant's condition, proof of an aggravation under the 2011 amendments of the Workers Compensation Act (Act) is insufficient by itself to establish a compensable claim.

This Board member finds that there is no error in the ALJ's findings of fact and conclusions of law. The ALJ correctly determined claimant did not sustain his burden of proving his deep vein thrombosis arose out of and in the course of his employment.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member,

⁴ K.S.A. 44-534a.

as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Preliminary Hearing Order of Administrative Law Judge Rebecca A. Sanders dated July 26, 2012, should be and hereby is affirmed.

IT IS SO ORDERED.

Dated this _____ day of November, 2012.

HONORABLE GARY R. TERRILL
BOARD MEMBER

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Rebecca A. Sanders, Administrative Law Judge

⁵ K.S.A. 2011 Supp. 44-555c(k).